

No. 89-563

Supreme Court, U.S.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1989

VIEUX CARRE PROPERTY OWNERS, RESIDENTS  
AND ASSOCIATES, INC.,

*Petitioner,*  
v.

COLONEL LLOYD KENT BROWN, *et al.*,  
*Respondents.*

On Petition for a Writ of Certiorari to the  
United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY BRIEF

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**PETITIONER'S REPLY BRIEF**

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The Federal Respondents' Brief in Opposition is most remarkable for its failure to address the fundamental issue presented by the pending petition: May a federal court disregard what it concedes to be the "literal construction" of a federal statute in favor of a contrary interpretation with purportedly "great practical appeal?" (Pet. App. 24a-25a (citing *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892).) Instead of defending the merits of the court of appeals' ruling that section 470f of the National Historic Preservation Act ("NHPA"), 16 U.S.C. § 470f (1982), which requires federal agencies to consider the effect of "any" federally licensed activities on historic properties, applies only to certain types of federally licensed activities (Pet. App. 25a), the Federal Respondents resort primarily to meritless procedural objections designed to divert attention

from the far-reaching implications of the Fifth Circuit's NHPA interpretation:

1. Without verification, the Federal Respondents assert that the pending petition is moot because the park portion of the challenged Aquarium Project was completed "while this case was on appeal" and "declaratory relief [therefore] can no longer be provided." (Fed. Br. in Opp. at 5.) This representation cannot be squared with the Federal Respondents' acknowledgment in papers filed with the U.S. District Court for the Eastern District of Louisiana several days ago that the park is at most "substantial[ly] complet[e]." In reality, construction continues on portions of the park, and large sections have not been opened to the public.<sup>1</sup>

Assuming *arguendo* that a portion of the challenged project is complete, however, a live case or controversy nevertheless remains. Even after a project developed pursuant to an Army Corp permit (including a nationwide permit) is finished, the Corps retains authority to order changes to the project through modification, suspension or revocation of the permit. See 33 C.F.R. §§ 325.7, 330.5(b)(9), 330.11(c) (1988). Thus, a section 470f historic review could still yield conditons on the applicable permit that would mitigate the adverse impacts of the project on the Vieux Carre National Historic Landmark District.<sup>2</sup> For example, the Army Corps could re-

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<sup>1</sup> Moreover, only five days ago, local officials announced plans for further expansion and development of the park. See The [New Orleans] Times-Picayune, Dec. 15, 1989, at 1.

<sup>2</sup> The Federal Respondents are incorrect in asserting that "[p]etitioner no longer claims that plans to construct the aquarium should have been submitted for historical comment." (Fed. Br. in Opp. at 5 n.4.) Even assuming that no individual permit is required for the Aquarium phase of the project, the Corps' NHPA obligations in permitting the riverfront park phase are not limited to the construction activity on only that portion of the project site. To the contrary, the Corps is required to consider not only the effects of the construction of the riverfront park, but also the ef-

quire additional plans for landscaping, parking, or traffic control measures in an effort to diminish the harm that the project will cause to the historic district. In sum, completion of the park phase of the project clearly would not deprive the district court of the ability to fashion effective relief. *See, e.g., United States v. Cumberland Farms of Connecticut, Inc.*, 826 F.2d 1151, 1161-65 (1st Cir. 1987) (affirming grant of Army Corps' request for injunction requiring defendant to restore wetland drained without permit), *cert. denied*, 108 S. Ct. 1016 (1988); *Columbia Basin Land Protection Ass'n v. Schlesinger*, 643 F.2d 585, 591 n.1 (9th Cir. 1981) (fact that power transmission line had been operating for several years "does not moot the claim [under NEPA] that it *should not be* operating in its present location") (emphasis in original); *Van Abbema v. Fornell*, 807 F.2d 633, 636 (7th Cir. 1986) (challenge to Army Corps' permit for coal loading facility not mooted by completion of facility because court "presumably could order that the facility be dismantled, altered or operated differently").

2. This Court's review of the Fifth Circuit's erroneous construction of section 470f would not be "premature." (Fed. Br. in Opp. at 6.) As the Federal Respondents acknowledge (*id.*), this Court has not hesitated to review decisions of the courts of appeals which are "fundamental to the further conduct of the case," regardless of the status of the proceedings. *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945); *see also Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685, n.3 (1949); *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947).

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facts of the entire Aquarium Project on the Vieux Carre National Historic Landmark District. *See* 36 C.F.R. § 800.2(c) (1988); *Colorado River Indian Tribes v. Marsh*, 605 F. Supp. 1425, 1438 (C.D. Cal. 1985) (under the NHPA, the Army Corps must consider the effects not only in the "permit area," but in the "affected area" as well).

It is difficult to imagine an issue more fundamental to the pending remand proceedings than the question presented for review. If the Fifth Circuit erred in concluding that an "inconsequentiality" exception should be applied in determining whether a federally permitted project should be subjected to section 470f historic review, the remand proceedings will be governed by an erroneous legal standard. And more importantly, if petitioner is correct in arguing that *all* federally permitted projects must be submitted for historic review, there is no need for remand at all because the parties agree that a federal permit (*i.e.*, an Army Corps nationwide permit) authorized the challenged project. (*See* Pet. App. 23a-24a.)

3. The Federal Respondents' argument that the "inconsequentiality" exception which the Fifth Circuit wrote into section 470f is supported by the statute's terms and legislative history is plainly without merit. The Federal Respondents misleadingly state that section 470f "requires an opportunity for historical comment only with respect to a federal 'undertaking.'" (Fed. Br. in Opp. at 7.) The Fifth Circuit itself acknowledged that the plain language of section 470f requires an advance historic impact review not only of "federal 'undertaking[s],' " but also of "any license" issued by a federal agency for a private "undertaking."<sup>3</sup> (Pet. App. 24a.) As noted previously, the Federal Respondents concede that the park portion of the Aquarium Project is authorized by an Army Corps nationwide permit, a type of federal license.

The Federal Respondents' argument that the Fifth Circuit's "inconsequentiality" exception is somehow supported by the legislative history of the NHPA (Fed. Br. in Opp. at 7) is also spurious. Reference to the legisla-

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<sup>3</sup> In relevant part, section 470f states: "the head of any Federal department or independent agency having authority to license *any* undertaking, shall . . . prior to the issuance of *any* license . . . take into account the effect of the undertaking on any historic district . . . ." 16 U.S.C. § 470f (1982) (*emphasis added*).

tive history is unnecessary because, as the Fifth Circuit observed, the terms of section 470f are not ambiguous. (See Pet. App. 24a-25a). In any event, the language Respondents quote from the legislative history of the 1980 amendments to the NHPA, H.R. Rep. No. 1457, 96th Cong., 2d Sess. 37, 45, *reprinted in* 1980 U.S. Code Cong. & Admin. News 6378, 6408, does not support an exception for "inconsequential" activities. That passage merely suggests that the degree of federal involvement in a project may affect the nature of the mitigation measures the Advisory Council must consider in its section 470f review and makes no suggestion that the degree of federal involvement affects the determination whether section 470f requires historic review in the first place. In fact, the full paragraph from which Federal Respondents quote makes clear that the historic review requirements of section 470f are to be broadly applied.<sup>4</sup>

Equally unfounded is the Federal Respondents' argument that the equitable doctrine of *de minimus non curat lex* requires federal courts to write "inconsequentiality"

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<sup>4</sup> The full paragraph of legislative history relied upon by the Federal Respondents states:

[t]he Committee also notes that the term "undertaking," as it is used in other sections of the Act, is meant to be used in the same context as described in Section [470f]. The Advisory Council on Historic Preservation has adopted an acceptable definition within its regulations, published as 36 CFR 800. [Those regulations broadly construe the term "undertaking" to "mean[] any project, activity, or program that can result in changes in the character or use of historic properties." 36 C.F.R. § 800.2(o) (1988).] The Committee intends that the Council take a "reasonable effort" approach in guiding Federal agencies in carrying out their preservation responsibilities. This means that the degree of Federal involvement in an undertaking and the relation of that involvement to the effects on historic property should both be considered when an agency determines the actions it will take, or which it requires an applicant to take, to comply with the provisions of this Act and its implementing regulations.

exceptions into the NHPA and other statutes. (Fed. Br. in Opp. at 7.) This doctrine has never been applied by this or any other federal court in the manner proposed by the Federal Respondents. Where Congress has seen fit to impose threshold requirements to curtail the reach of legislation (particularly environmental impact laws), it has done so expressly.<sup>5</sup> Moreover, existing federal regulations of the Advisory Council on Historic Preservation already ensure that licenses or federal undertakings posing only "inconsequential" impacts on historic properties are not subject to section 470f review. Under those regulations, review obligations are limited to only those activities that by their nature "can result in changes in the character or use of historic properties." 36 C.F.R. § 800.2(o) (1988).<sup>6</sup> In this case, federal respondents have never contested the proposition that building a major project in the midst of the Vieux Carre National Historic Landmark District could "result in changes in the character or use" of that historic district.

Finally, Respondents' efforts to ignore the split among the circuits on the question presented is highly disingenuous. The Fifth Circuit expressly recognized the conflicting interpretations set forth by the Eighth and Tenth Circuits in *Ringsred v. City of Duluth*, 828 F.2d 1305 (8th Cir. 1987), and *Riverside Irrigation Dist v. Andrews*, 758 F.2d 508 (10th Cir. 1985), and deliberately opted for a third, conflicting interpretation of what triggers the NHPA's historic review requirements. (Pet. App. 13a, 23a-25a.) Respondents and Petitioners relied

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<sup>5</sup> See, e.g., National Environmental Policy Act, 42 U.S.C. § 4332 (2)(C) (1982) (limiting environmental impact requirements to "major Federal actions significantly affecting the quality of the human environment").

<sup>6</sup> Thus, contrary to Respondents' suggestion, a nationwide permit authorizing placement of temporary buoys or crab and lobster traps would not be subject to section 470f historic impact review because historic properties could not even potentially be affected by such activities.

heavily upon *Ringsred* and *Andrews*, respectively, as controlling precedent in the proceedings below, and Respondents should not now be heard to say that these cases are irrelevant.

### CONCLUSION

If the Fifth Circuit's interpretation of section 470f is allowed to stand, Congress' command that federal agencies assume responsibility for the effects of their licensed activities on historic properties will be largely countermanded. See 16 U.S.C. §§ 470f, 470h-2(d), 470h-2(f) (1982). As a result, hundreds of historic properties may be thoughtlessly damaged or destroyed. Given the importance of this issue to the continuing vitality of Congress' historic preservation mandate and the Federal Respondents' apparent disinclination to defend the Fifth Circuit's decision on the merits, a writ of certiorari should issue.

Respectfully submitted,

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